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No. 82-567

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Howard A. Williams and Shirley Jo Williams,
Appellants,

V.

Cheetwood & Davies, Attorneys at Law
Appellees,

APPEAL FROM WOOD COUNTY COURT OF APPEALS JURISDICTIONAL STATEMENT

Howard A. & Shirley Jo Williams
Appellants Acting Pro Se
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Bowling Green, Ohio 43402

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether both the trial court and the appellate court violated Title 28 U.S.C. §1654 and the First Amendment to the United States Constitution concerning freedom of speech and redress of grievances by refusing to acknowledge the question of attorney's right to be paid for fraudulent representation. Many material facts supporting this argument were included in the *Memorandum in Opposition to Motion for Summary Judgment.* The Wood County Court of Appeals agreed with the trial court that the issue was not one of fraudulent representation, but "whether appellants owed appellee money on account for fees for legal services rendered."

2. Whether both the trial court and the appellate court ignored the proper application of Ohio and Federal Civil Rule 24 in refusing the intervention of Diane Lynn Williams and the United States Constitutional effects thereof.

3. Whether Ohio Civil Rule 56 is repugnant to the due process of law clause in the United States Constitution.

4. Whether Title 15 U.S.C. §1673 was violated by the garnishment of wages in Shirley Jo Williams' checking account after an *Affidavit and Order in Garnishment (non-wages)* was filed.

LIST OF ALL PARTIES

Parties Plaintiff-Appellee
Cheetwood & Davies, Attorneys at Law

Parties Defendant-Appellant
Howard A. Williams
Shirley Jo Williams

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Pursuant to Rules 12(1), 12(3), and 15 of the Rules of the Supreme Court of the United States, appellants Howard A. and Shirley Jo Williams, file this statement of the bases upon which it is contended that the Supreme Court of the United States has jurisdiction to review the *Decision and Journal Entry* of the Wood County Court of Appeals in this case, and should exercise such jurisdiction herein.

OPINIONS OR ORDERS BELOW

The *Decision and Journal Entry* of the Wood County Court of Appeals concerning this case is unreported and unpublished. It is included herein as Appendix I-A and may be found on page A-1.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from the sustaining of a *Motion for Summary Judgment* made by the Plaintiffs in Bowling Green Municipal Court Case No. 80-CV-F-613. The *Decision and Journal Entry* of the Wood County Court of Appeals was filed of record on March 19, 1982. A timely notice of appeal was filed and appeal pursued to the Supreme Court of Ohio. The *Orders* of the Supreme Court of Ohio overruling the *Motion to Certify the Record,* the *Appeal as of Right,* and rehearing on the above were entered on June 16, 1981, June 16, 1982, and July 7, 1982 respectively. A timely *Notice of Appeal* was filed with the Wood County Court of Appeals on September 20, 1982.

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257, providing for the United States Supreme Court review of state court decisions. The cases which support jurisdiction of the Court include:

1. Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 US 300, 61 L Ed 1153, 37 S Ct. 643
2. Cohen v. California (1971) 403 US 15, 29 L Ed 2d 284, 91 S Ct 1780, reh den 404 US 876, 30 L Ed 2d 124

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment of the United States Constitution

> Congress shall make no law ... abridging the freedom of speech ... and to petition the Government for a redress of grievances.

Fourteenth Amendment of the United States Constitution (Section 1)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rule 24(B) (2)

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

Civil Rule 60(B)

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the

following reasons: (1) mistake, inadvertence, surprise or excusable neglect; ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), mistrepresentation or other misconduct of an adverse party.

Civil Rule 56(C)

Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of act, if any, timely filed in the action, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to judgment as a matter of law.

A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, *that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made,* such party being entitled to have the evidence or stipulation construed most strongly in his favor.

Title 28, United States Code, §1654, Appearance Personally or by Counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

Title 15, United States Code, §1673, Restriction on Garnishment — Maximum Allowable Garnishment

(a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which is disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a) (1) of Title 29 in effect at the time the earnings are payable.

whichever is less.

(c) No court of the United States or any State may make, execute, or enforce any order or process in violation of this section.

In Re Kokoszka, 479 F2d 990 (headnotes included herein; case located in Appendix V-A, pp. A-13)

12. Exemptions, 48(1)

The intent of the Consumer Credit Protection Act was to make sure that wage earners were able to receive at least 75% of their take home pay in any one pay period so that they would have enough cash to meet basic needs.

Title 28, United States Code Service, §1441, note 110, Garnishment, Attachment, Execution, Finn v. Rotating Valve Corp. (1938 DC NY) 25 F Supp 206

Action in aid of attachment is merely auxiliary to main suit and cannot be separately removed.

STATEMENT OF THE CASE

This suit was brought by Cheetwood & Davies, Attorneys at Law in the Bowling Green Municipal Court against Howard A. Williams and Shirley Jo Williams. The *Complaint* charged John S. Cheetwood was retained by Defendants in defense of an action known as James L. Smith, et. al., v. Howard Williams, et. al., being Case No. 78-CIV-340 in the Wood County Common Pleas Court and employed Plaintiff for various other matters including insurance on their swimming pool, soil removed from the right of way adjacent to their property, and approving an answer to a letter from a relative. It further charged he had accepted employment and duly performed all conditions of its part; therefore, he should be paid $7,036.80. The Defendants timely filed an *Answer* establishing the affirmative defense of fradulent representation.

The facts giving rise to this appeal can be simply stated. The question was whether an attorney who had acted in bad faith should be paid. The bad faith ranged from simple negligence in preparation of the pleadings for Case No. 78-CIV-340, to acting within a conspiracy to defraud his clients of their real property rights. The evidence presented by both the Plaintiff-Appellee and the Defendants-Appellants supported the Defendants' position of fraduluent representation. The allegations of collusion and consipracy between John S. Cheetwood, Rex Huffman, Martin L. Smith, and Donald D. Simmons were made in the *Answer*. They were reiterated in the *Memorandum in Opposition to Motion for Summary Judgment*. The detailed material facts were also enclosed in these documents to prove the truth of the allegations. For the trial court to have stated "the attorneys acted in good faith and find no proof of negilgence" is absurd.

The First Amendment to the United States Consti-

tution guarantees freedom of speech and the right to petition the government for a redress of grievances among the "inalienable rights" protected. Title 28, U.S.C. §1654 grants parties the right to represent themselves. These laws notwithstanding, the Court of William R. McMahon was prejudiced against laymen representing themselves. A pre-trial conference was held on April 15, 1981. Various pages of the pre-trial conference was held on April 15, 1981. Various pages of the pre-trial conference transcript exhibited Judge William R. McMahon's prejudice against the Williams' pro se representation including, but not limited to, pages 37-39, 41, and 43. During the pre-trial conference, Judge William R. McMahon suggested R. Nigel Davies file a *Motion for Leave to File Motion for Summary Judgment*. This also shows the Court's prejudice against pro se representation by laymen. Judge William R. McMahon was precluded from aiding laymen in self-representation; however, he told R. Nigel Davies how to proceed with his case against the Williams'. Judges are supposed to impartially decide cases based upon the evidence presented, not to aid one party in defeating the other.

In granting Plaintiff-Appellee's *Motion for Summary Judgment*, Judge William R. McMahon cited "mistakes made" by the Defendants as grounds for granting the *Summary Judgment*. These "mistakes" included the lack of sufficient affidavits. If the lack of affidavits precluded the Court from considering the Defendants' exhibits attached to the *Memorandum in Opposition to Motion for Summary Judgment*, the Plaintiff's own exhibits supported the Defendants' position. Both the trial court and the appellate court have acknowledged the proper form of the Plaintiff's evidence. If such evidence had been examined, the Court would have discovered a "conflict of interest" in the representation of the Williams' by John S. Cheet-

wood. While praising the "form" of the Plaintiff's exhibits, the courts have overlooked the "substance."

In early October, 1978, Howard and Shirley Jo Williams consulted John S. Cheetwood regarding a farm drainage problem. This was a simple, routine legal problem which should have been handled as an office procedure. Instead, John S. Cheetwood inflated it out of all proportion, manipulated it into court, and assisted Martin L. Smith into elongating it into a two and one-half day jury trial. A problem which should have cost the Defendant-Appellants approximately $200.00 to $300.00 became a $7,036.80 conflict, according to John S. Cheetwood's figures. Such action is fraud as defined by *Black's Law Dictionary*, page 594, Fraud, which states:

> "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury."

The Williams' relied upon John S. Cheetwood's lack of concern over this drainage problem. Howard Williams proceeded to remove the obstructions in the surface drains. He did this in the same manner, and by the same method, as he had done for over thirty years. This action resulted in a *Complaint* being filed against Howard and Shirley Jo Williams by James L. and Patricia A. (J). Smith. Mr. and Mrs. Smith were purchasing a portion of the farm frontage from its' original owner, Clark M. Young. Neither Mr. Young, nor his attorney, Lelan S. Middleton had made legal provisions for this drainage via a written easement, thus an implied easement arose. It can factually be proven John S. Cheet-

wood had knowledge of this drainage problem *before* James L. and Patricia A. (J.) Smith filed their *Complaint*. The Smith's were represented by James L. Smith's brother, Martin L. Smith. The *Complaint* was Case No. 78-CIV-340 in the Wood County Common Pleas Court. John S. Cheetwood had had prior knowledge of the drainage problem and adequate time in which to research the subject. He had offered the Williams' no solutions, no legal advise, and no concern regarding the reinstatement of the drains which had been obstructed by an employee of James L. Smith. He did not advise Howard Williams NOT to reinstate the surface drains. By removing the obstructions to the two surface drains, Howard Williams innocently walked into the trap which had been set for him!

The Williams' were faced with the first lawsuit of their lives. They retained John S. Cheetwood in "good faith" and expected professional representation from him. Instead, he made every mistake possible regarding Case No. 78-CIV-340. His mistakes began with the *Answer and Counterclaim*. Shirley Jo Williams insisted this pleading be rewritten as the original contained several ideas of pure fantasy.

John S. Cheetwood had eleven months to prepare for the trial of Case No. 78-CIV-340, yet he took his clients into court unprepared, and without an adequate, thorough, and professional case. The Williams' demand an explanation for this unprofessional behavior before they pay $7,036.80! By granting the *Motion for Summary Judgment,* Judge William R. McMahon has *suppressed* this knowledge. Without an open hearing, the Williams' will never know why they were victimized by an attorney.

There were numerous office conferences held between John S. Cheetwood, Shirley Jo Williams and Howard Williams between December 1, 1978 and October 1, 1979. At all of the conferences, their daughter,

Diane Lynn Williams was present. The Williams' presumed Diane was a party to this action since she was an active participant in these conferences. Diane Lynn Williams presumed John S. Cheetwood was representing her and her real property interests. He had drawn up Diane's deeds when her mother transferred two acres of the farm frontage containing the disputed water rights in Case No. 78-CIV-340. John S. Cheetwood knew about Diane Lynn Williams' real property drainage rights. He had also been informed of the subsurface drainage system and included it in the counterclaims of Case No. 78-CIV-340. This system began on Diane Lynn Williams' property and John S. Cheetwood was cognizant of this fact. Diane Lynn Williams was also involved in the minor issues of Case No. 80-CV-F-613 in that the dirt removed came from her property and the response to the letter concerned a building which she has used for the last ten years as her domicile. It was not until the April 15, 1981 pre-trial conference John S. Cheetwood denied representing her interests. Without representation by John S. Cheetwood and not allowed pro se representation, Diane Lynn Williams' property rights were confiscated without the benefit of the 14th Amendment to the United States Constitution guarantee of due process of law. Diane was denied "notice," as she was not named a party to Case No. 78-CIV-340; she was denied access to the courtroom; she was denied the opportunity to face her accusers; she was denied the opportunity to sit at the "bar;" and most of all, she was denied the "opportunity to be heard." The transcript of Case No. 78-CIV-340 will verify these statements. Diane Lynn Williams filed both a *Motion to Intervene* pursuant to Civil Rule 24 and a Civil Rule 60 (B) *Motion* for Relief of the Order denying intervention into Case No. 80-CV-613. Both of these *Motions* were summarily overruled. Diane Lynn Williams is in the unique position of having her proper-

ty rights taken away by an attorney and prevented from redressing her grievances in open court.

John S. Cheetwood should be held accountable for his negligence and fraud. By granting the *Motion for Summary Judgment,* Judge William R. McMahon has refused to acknowledge the important issue of fradulent representation. The appellate court sustained the trial court's refusal to view the issue of fradulent representation by stating: "the sole issue before the trial court was whether appellants owed appellee money on an account for fees for legal services rendered." The following is a brief summary of the material facts in support of the issue of fradulent representation in Case No. 78-CIV-340:

1. Shirley Jo Williams testified as a Plaintiff's witness, but not as a witness for her own case, thus incriminating herself and her case.

2. Diane Lynn Williams was "locked out" of Case No. 78-CIV-340, and her property rights confiscated without due process of law or the equal protection of the laws.

3. The composition of the jury was not impartial.

4. Time became very important after the beginning of the Defendants' case. Many subliminal references to time and "let's hurry up" were introduced into the Defendants' case by John S. Cheetwood, Martin L. Smith, and Donald D. Simmons.

5. John S. Cheetwood allowed slanderous attacks upon his clients reputation by the Plaintiffs, and their attorney, Martin L. Smith.

6. John S. Cheetwood permitted irrelevant and immaterial evidence to be presented by the Plaintiffs ruining Shirley Jo Williams' reputation.

7. John S. Cheetwood did not prepare an adequate case to take to trial.

8. John S. Cheetwood, although well-educated and experienced, did everything wrong once in the cour-

troom. A Duke University graduate could not present a simple multiplication problem to the jury.

9. The exhibits used by John S. Cheetwood were of extremely poor quality and the witnesses had difficulty seeing them.

10. John S. Cheetwood, defense counsel; Rex Huffman, defense counsel; and Martin L. Smith, plaintiffs' counsel, were all connected with the Wood County Prosecuting Attorneys' Office.

This list has been limited to these ten items for the sake of brevity; although many more could have been elicited.

It was not just trial preparation and trial activities where John S. Cheetwood did not render proper services. His unprofessional conduct continued through to the post-trial paper simply titled *Motions*. Item number 1 of that document stated:

> "To vacate the judgement which was rendered in conformity to the verdict of the jury and to render judgment in favor of the defendants notwithstanding the verdict for the reason that the defendants are entitled by law to judgment in their favor upon the evidence received at the trial."

While this was an excellent issue, it was *never* mentioned in the accompanying *Memorandum*. It became an idea without any supportive substance. The law and supporting case law were also conspicuously absent from this document. This law totally supported the Defendants' position, why was it not utilized? The paper presented to the court was in conformance with John S. Cheetwood's other work, weak and ineffectual. The Williams' cannot, in good conscience, pay for this obvious fradulent representation.

The 1968 Amendment to the Ohio Constitution granted rule making power to the Ohio Supreme Court. This rule making authority was abused when Civil Rule

56 was instituted. It abridges and violates the "due process of law" clause to the United States Constitution. Section 1 of the Fourteenth Amendment of the United States Constitution was ratified in 1868 and comprises a fundamental portion of our liberty and freedom in the United States. Any law or state constitutional amendment which abrogates those goals of freedom and due process of law should be declared unconstitutional and void.

Civil Rule 56 is construed so it may be manipulated by any party having enough influence with the judge. Judge William R. McMahon used only part of Civil Rule 56(C) in determining the summary judgment, while ignoring another part of that same rule. Judge William R. McMahon used the portion which states: "no genuine issue as to any material fact," while failing to recognize the portion which sttes: "reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made." Considering the conduct of John S. Cheetwood outlined on the previous pages, reasonable minds could *not* come to the conclusion that he "had performed all conditions of its part" in "good faith." A conflict existed. John S. Cheetwood insisted he represented his clients competently. Howard and Shirley Jo Williams vehemently contended they were not represented properly, competently, or in "good faith." The excuse given for granting this summary judgment was "no genuine issue as to any material fact." The true reason for granting the summary judgment was to cover-up the fraud, collusion, and violations of state and federal law perpetrated in Case No. 78-CIV-340 by John S. Cheetwood and his fellow conspirators.

The effect of the *Summary Judgment* under Civil Rule 56 was to deny the defendants their "day in court", and "opportunity to be heard." These rights are protected under the 14th Amendment to the United States

Constitution. Civil Rule 56 was misused, abused, and manipulated for illegal and unjust purposes. The very concept of justice was violated by this rule and its current application. Any rule so subject to misuse and manipulation should be stricken from the books and declared unconstitutional.

On September 14, 1981, R. Nigel Davies obtained a *Court Order in Garnishment (non-wages)* from the Clerk of the Bowling Green Municipal Court. John S. Cheetwood's "alleged" attorney fees amounted to $7,036.80, plus $58.37 for court costs, making a total of $7,095.17.

R. Nigel Davies used the fraudulent *Summary Judgment* ruling of September 1, 1981 as the basis for the *Court Order in Garnishment — (non-wages).* The *Summary Judgment* ruling was fraudulent because the court refused to consider the material issue of fraudulent representation by John S. Cheetwood. By refusing to acknowledge this important material issue, Judge William R. McMahon permitted *Summary Judgment.* If there had been no *Summary Judgment,* R. Nigel Davies would not have had an excuse to *steal* monies "allegedly" owed his law partner and violate federal garnishment laws.

A copy of the *Court Order in Garnishment (non-wages)* was sent to the Mid-American National Bank & Trust Company. (Hereinafter Mid-Am). Shirley Jo Williams maintained checking account number 758-034 at Mid-Am. Howard Williams was employed by Henry Filters, Inc., Bowling Green, Ohio. A stipulation of his employment was to maintain an account with Mid-Am. The wages earned by Howard Williams from this employment was directly deposited into checking account number 578-034.

Acting under the authority of this *Court Order in Garnishment (non-wages)* Mid-Am proceeded to *strip all* of the monies contained in checking account number

578-034. This act occurred on September 15, 1981, and was accomplished via a cashier's check payable to Bowling Green Municipal Court. The sum removed was $1,325.84. This action was taken without warning or notice of any kind. This *stripping of the account* was a violation of 15 U.S.C. §1673, Restrictions on Garnishment and In Re Kokoszka, 479 F2d 990, because checking account number 578-034 contained *only wages.* Mid-Am violated a *Court Order in Garnishment (non-wages).* The Clerk of the Bowling Green Municipal Court violated the *Court Order* as he received and kept the $1,325.84.

Said monies were not returned to Shirley Jo Williams, or checking account number 578-034 at Mid-Am. This raid on the Williams' finances created a hardship at the time. Grocery money was not available until the following week's paycheck. Ohio's poor economy forced the lay-off of Howard Williams from Henry Filters, Inc. on December 4, 1981. This illegally obtained money, $1,325.84, would be useful in paying current bills – not fraudulent representation by an attorney.

The *Affidavit and Order in Garnishment (non-wages)* was fraudulent. Under it's terms, R. Nigel Davies stated under oath:

> "I ALSO MAKE OATH that no part of the personal earnings of the defendant are sought to be attached in this proceeding."

This oath was signed and dated. Personal earnings were attached because *only wages* were taken. Shirley Jo Williams' savings accounts at Mid-Am were left untouched!

Legal research revealed garnishment and attachment proceedings to be auxiliary to the main suit, thus not separately removable to federal court. (Finn v. Rotating Valve Corp., 25 F Supp 206). The *Court Order in Garnishment (non-wages)* cited Case No. 80-CV-F-613 in it's caption. The defendant-appellants thus

asserted it was a proper issue for appellate determination. If the *Court Order in Garnishment* (non-wages) was not separately removable, and not a portion of Case No. 80-CV-F-613; it certainly was a lonely little piece of paper with nowhere to go!

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that thousands of lay people retain attorneys to solve legal problems every day. They have a right to expect their attorney will represent them competently, without regard of political pressures, and in "good faith." In the instant case, the attorney made pretense of representation, while conspiring with plaintiff's attorney, Martin L. Smith, to seize the Williams' property rights. Furthermore, this attorney sued his clients for his alleged fees and the Court refused to acknowledge the true issues of material fact. Judge William R. McMahon made a mockery out of the "open court concept." A *Summary Judgment* was granted against Howard A. and Shirley Jo Williams, preventing them from every having their "day in court" to make John S. Cheetwood responsible for his actions. Based upon the *Summary Judgment,* an *Order in Garnishment (non-wages)* was obtained and wrongfully executed. It is apparent from the proceeding that the Williams' were the injured party, not John S. Cheetwood. It is imperative that the United States Supreme Court review this case for proper disciplining of this wayward attorney.

The statute cited in support of jurisdiction in this Court is Title 28, United States Code, Section 1257. The cases supporting this jurisdiction are Cuyahoga River Power Co. v. Northern Realty Co. (1917) 244 US 300, and Cohen v. California (1971) 403 US 15. These cases were cited in support of the Wood County Court of Appeals being the highest court in which review could be

had. The Supreme Court of Ohio has refused jurisdiction in this case, thereby making the Appellate Court decision the final appealable order.

CONCLUSION

For the reasons stated above, defendant-appellants submit that this appeal brings before the Court substantial federal questions and federal constitutional issues which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated October 1, 1982.

The defendant-appellants, acting pro se, hereby certify that they have prepared the foregoing *Jurisdictional Statement* on this 1st day of October, 1982, and that all statements are true and accurate to the best of their knowledge. This document is very respectfully submitted to the United States Supreme Court for its consideration.

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Appendix I-A

COURT OF APPEALS OF OHIO
SIXTH DISTRICT
COUNTY OF WOOD
C.A. NO. WD-81-70

Cheetwood & Davies, Attorneys at law APPELLEES	**APPEAL FROM** **BOWLING GREEN**
-VS-	**NO. 80-CVF-613**
Howard A. Williams and Shirley Jo Williams APPELLANTS	**DECISION &** **JOURNAL ENTRY**
DATE March 12, 1982	

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

This cause comes to this court on appeal from the Bowling Green Municipal Court, Wood County, Ohio, which court granted summary judgment to appellee. Appellee had commenced an action to recover from appellants the sum of $7,036.80, which sum, appellee alleged, was due appellee as and for the reasonable value of legal services performed by appellee for appellants. The trial judge, after considering all of the matters then before him, including, but not limited to, affidavits and pleadings, found "... no true issues as to any material facts" and granted summary judgment to appellee.

From this judgment appellants appeal, presenting for this court's consideration the following six assignments of error:

"I. IT WAS ERROR FOR THE TRIAL COURT TO GRANT A MOTION FOR SUMMARY

JUDGMENT IN CASE NO. 80-CV-F-613 AS THERE WERE MANY ISSUES OF MATERIAL FACT WHICH INSTEAD OF BEING DISCUSSED OPENLY BEFORE AN IMPARTIAL TRIBUNAL, WERE NEATLY 'SWEPT UNDER THE RUG'!!

"II. IT WAS ERROR FOR THE TRIAL COURT TO GRANT SUMMARY JUDGMENT AS THE RULE UPON WHICH IT IS BASED IS UNCONSTITUTIONAL.

"III. IT WAS ERROR FOR THE TRIAL COURT TO GRANT A SUMMARY JUDGMENT, AS IT WAS WITHOUT JURISDICTION AT THE TIME THE SUMMARY JUDGMENT WAS GRANTED.

"IV. IT WAS ERROR FOR THE TRIAL COURT TO GRANT A SUMMARY JUDGMENT IN CASE NO. 80-CV-F-613, SINCE DIANE LYNN WILLIAMS WAS NOT NAMED AS A PARTY AND WAS DENIED INTERVENTION INTO SAID LAWSUIT.

"V. IT WAS ERROR FOR THE COURT TO GRANT THE SUMMARY JUDGMENT BECAUSE THAT JUDMENT IS DISCRIMINATORY!!

"VI. IT WAS ERROR FOR THE TRIAL COURT TO GRANT THE MOTION FOR SUMMARY JUDGMENT AS THAT RULING LEAD DIRECTLY TO THE GARNISHMENT OF THE CHECKING AND SAVINGS ACCOUNTS OF HOWARD AND SHIRLEY J. WILLIAMS. IN PART, THIS WAS A VIOLATION OF THE FEDERAL STATUTES CONCERNING GAR-

NISHMENT."

Assignment of error No. I is found not well taken. While there is extensive discussion in appellants' brief following the listing of this alleged error, none of that discussion has direct reference to the legal question of the trial court's granting of the judgment. We find that upon review of the entire record, the sole issue before the trial court was whether appellants owed appellee money on an account for fees for legal services rendered. The trial court had before it evidence as provided for in the rules and, further, we find that based upon the evidence and the requirements of the rules, the trial court properly granted summary judgment. See Civ. R. 56(A) (C) and (E). Appellees' affidavits were complete, extensive, and in proper form. Contra these affidavits, we have only the unsworn, often rambling dissertations of appellants which obviously do not rise to the level of acceptable evidence or proof. When a motion for summary judgment has been properly made, a trial court, before granting the same, must determine (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. Harless v. Willis Day Warehousing Co. (1978, 54 Ohio St. 2d 64. The trial court found these tests to have been met and we agree.

Assignment of error No. II, as discussed in appeallants' brief, seems to be questioning the constitutionally of Civ. R. 56. The Ohio Rules of Civil Procedure were, pursuant to constitutional authority, promulgated by the Ohio Supreme Court and submitted to the legislature for concurrence and/or amendment. All of the prerequisites having been met, the giving of life to

the rules (including Civ. R. 56) in accordance with the mandates of Article IV, Section 5 of the Ohio Constitution, makes them unquestionably constitutional absent any authority to the contrary. Appellants have cited this court to no authority, and assignment of error No. II is not well taken.

Appellants' third assignment of error is not well taken. The trial court did not, pursuant to R.C. 2701.02, lose jurisdiction or the authority to decide this case. See Kyes v. Pennsylvania Rd. Co. (1952), 158 Ohio St. 362.

Appellants, in assignment of error No. IV, say that their daughter should have been permitted to intervene in this cause because she had had some professional contact with appellee on a previous occasion. However true that may or may not be, that is not the issue in this case. Here appellee says appellants owe money to appellee. Others may (or may not) also owe money to appellee, but it is for appellee to determine who will be the parties defendant in the lawsuit filed by appellee. Absent a showing that the proposed intervenor was a necessary party to the determination of the suit, the trial court properly denied the motion. The fourth assignment of error is not well taken.

Assignment of error No. V is a rehash of that presented by appellant in assignment of error Nos. I, II, and III. This assignment is also not well taken and the court adopts for its reasons those expressed in considering assignments of error Nos. I, II and III.

Assignment of error No. VI is not well taken. The matter before the trial court was the question of summary judgment on appellee's motion on the issue of whether a debt was owed by appellants to appellee. The subsequent garnishment proceedings were not part of that determination and thus not a proper subject of appeal in and from cause 80-CV-F-613.

Finding that all of appellants' assignments of error

are not well taken, the judgment of the Municipal Court of Bowling Green, Wood County, Ohio, is affirmed in all respects. This cause is remanded to said court for assessment of costs. Costs to appellants.

A certified copy of this entry constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., P. J.

John J. Connors, Jr.
PRESIDING JUDGE

Andy Douglas, J.

Andy Douglas
JUDGE

John H. Barber, J. concur.

John H. Barber
JUDGE

Appendix II-A

IN THE BOWLING GREEN MUNICIPAL COURT
BOWLING GREEN, OHIO

Cheetwood & Davies Plaintiff	Case No. 81-CV-F-613
vs.	
Howard A. Williams, et al Defendant	JUDGMENT ENTRY

This day this matter came on for consideration of the court upon the motion for summary judgment, memoranda and other pleadings filed herein and the court, after careful pursual of the affidavits and other pleadings in support, considering factors which include the nature and extent of the services, the time occupied and the performance of them, the character and importance of the questions involved, as well as the statement in defendants' answer, results accomplished from the rendition of the services within the guidelines of the code of professional responsibility, Cannon II, DR 2-106(B) the court finds as follows:

1. That there are no true issues as to any material facts.

2. That the attorneys acted in good faith and find no proof of negligence nor any allegation which would negate the presumption of good faith and lack of material negligence.

3. That defendants who assuming the risks of self-representation in this matter have shown dissatisfaction with the opinion of the courts attributing the dissatisfaction to factors which reveal a misunderstanding of both plaintiffs' and defendants' rights, trial procedure and tactics and have not filed counter affidavits to con-

tradict plaintiffs affidavits attached to their summary judgment motion, and thus that plaintiff is entitled to summary judgment, and that the fee of $7,036.80 is reasonable and sanctions as requested by plaintiff in view of the courts' granting summary judgment are denied and it is therefore;

ORDERED, ADJUDGED and DECREED that plaintiff is hereby granted judgment in the sum of $7,036.80 against defendants Howard A. Williams and Shirley J. Williams and the defendant be taxed with costs.

Willaim R. McMahon, Judge
Sitting by Assignment

I hereby certify that this is a true and correct copy of the original document filed at Municipal Court, Bowling Green, Ohio.

Kenneth H. Schauweker, Clerk of Court

By KENNETH H. SCHAUWEKER, Clerk
This 1st day of September, 1981

Appendix III-A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1982 TERM

To wit: July 7, 1982

Cheetwood & Davies,
Appellees,
vs.
Howard Williams et al.,
Appellants.

No. 82-713

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 7th day of July 1982

THOMAS L. STRATZMAN, Clerk.

By Sam F. Jenkins, Deputy.

Appendix III-B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *City of Columbus.*	*1982 TERM* *To wit: June 16, 1982*
Cheetwood & Davies, Appellees, vs Howard Williams et al., Appellants.	No. 82-713 **MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS** *for Wood County* **TO CERTIFY ITS RECORDS**

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee $20.00, paid by S. J. Williams

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.
Witness my hand and the seal of the Court this _____ day of June 7, 1982

THOMAS L. STRATZMAN, Clerk

Sam F. Jenkins, Deputy

Appendix III-C

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.
Cheetwood & Davies,
Appellees,
vs.
Howard Williams et al.,
Appellants.

1982 TERM
To wit: June 16, 1982

No. 82-713
APPEAL FROM THE COURT OF APPEALS

for Wood County

This cause, here on appeal as of right from the Court of Appeals for Wood County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of June, 7, 1982

THOMAS L. STARTZMAN, Clerk

Sam F. Jenkins, Deputy

Appendix IV-A

IN THE COURT OF APPEALS OF WOOD COUNTY, OHIO SIXTH APPELLATE DISTRICT AND IN THE BOWLING GREEN MUNICIPAL COURT BOWLING GREEN, OHIO

Cheetwood & Davies,	:	**Bowling Green Municipal**
Plaintiff-Appelles,	:	**Court Case No.**
vs.	:	**80-CV-F-613**
Howard A. Williams,	:	**Sixth District Court**
	:	**of Appeals**
and	:	**Toledo, Ohio**
		Case No. WD-81-70
Shirley Jo Williams,		
Defendant-Appellants.	:	**Ohio Supreme Court**
		Case No. 82-713

***

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Howard A. Williams and Shirley Jo Williams, the above-named defendant-appellants, hereby appeal to the Supreme Court of the United States from the *Decision and Journal Entry* of the Wood County Court of Appeals rendered on March 12, 1982 and filed of record on March 19, 1982. The *Order* of the Supreme Court of Ohio denying rehearing on the *Motion to Certify the Record* and *Appeal as a Matter of Right* was entered on July 7, 1982.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (1).

The defendant-appellants are pursuing this appeal personally as provided by Title 28, United States Code, Section 1654.

Dated September 20, 1982.

Howard A. Williams
15236 Mitchell Road
Bowling Green, Ohio 43402

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402

PROOF OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on September 20, 1982, pursuant to Rule 28(3), Rules of the Supreme Court, I served a copy of the foregoing *Notice of Appeal to the Supreme Court of the United States* on each of the parties herein as follows:

On Cheetwood & Davies, appellees herein, by depositing such copy in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of R. Nigel Davies, the above named appellees' counsel of record at 317 North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.

Dated September 20, 1982.

Shirley Jo Williams
15236 Mitchell Road
Bowling Green, Ohio 43402
Telephone: (419) 352-2477

Appendix V-A

In the Matter of Henry A. KOKOSZKA et al., Bankrupts, Petitioners.
No. 496, Docket 72-1972.

United States Court of Appeals,
Second Circuit.

Argued Feb. 28, 1973.

Decided May 18, 1973.

Appeal by three bankrupts from judgment of the United States District Court for the District of Connecticut, Newman, J., which held that income tax refunds passed to the respective trustees in bankruptcy. The Court of Appeals, Robert P. Anderson, Circuit Judge, held that federal income tax refund was "property" which passed to the bankruptcy trustee. The Court further ordered that the case of one bankrupt be remanded for further consideration with respect to denial of discharge.

Affirmed in part, reversed in part.

See also 336 F.Supp. 1029.

1. Bankruptcy 137

The term "property" as used in bankruptcy law provision vesting the bankruptcy trustee with the title to the bankrupt's property, is given a generous construction in order to give creditors everything of value, including items where the enjoyment of value is postponed, but definition of "property" is limited when the debtors are wage earners whose sole source of income, before and

after bankruptcy, is their weekly earnings. Banker.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

See publication Words and Phrases other judicial constructions and definitions.

2. Bankruptcy 143(1)

The test as to whether such items as accrued but unpaid wages are "property" which must be turned over to the bankruptcy trustee is whether the item is sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as "property" and turned over to the trustee. Bankr.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

3. Bankruptcy 143(1)

Federal income tax refund was "property" which passed to the bankruptcy trustee. Bankr.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

4. Bankruptcy 143(1)

Just because some property interest had its source in wages does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which have their origin in wages, Bankr.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

5. Bankruptcy 143(1)

Fact that bankrupts had either spent or would spend their federal income tax refunds for such needed items as health care, furniture and rent or other "necessities" did not remove such refunds from the status of "property" which passed to the trustee. Bankr.Act, § 70, sub.a(5), 11 U.S.C.A. § 110(a) (5).

6. Bankruptcy 143(1)

Bankrupts were not entitled to retain federal income tax refunds on basis that to take refunds from them would deny them fresh start in life. Bankr.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

7. Bankruptcy 4

The purpose of the Bankruptcy Act was to benefit creditors and debtors, not trustees. Bankr.Act. § 48, sub. c(1), 11 U.S.C.A. § 76(c) (1).

8. Bankruptcy 150

If debtor is in position where his nonexempt assets will be entirely eaten up by administration costs, leaving nothing for creditors, he is entitled to move the bankruptcy court for an order of abandonment. Bankr.Act, § 70, sub. a(5), 11 U.S.C.A. § 110(a) (5).

9. Bankruptcy 150

Whether to grant motion for abandonment rests in the sound discretion of the referee in bankruptcy.

10. Bankruptcy 150

Referee in bankruptcy should grant motion for abandonment if it is reasonably clear that the assets, otherwise available for creditor, will be entirely consumed by trustee's fees and other administration expenses, that no creditors have shown that there was likely opportunity for trustee to recover additional assets, and that the absence of a trustee will not, under the circumstances, cast substantial additional burden on the bankruptcy court. Bankr.Act. § 48, sub.c(1), 11 U.S.C.A. § 76(c) (1).

11. Exemptions 48(2)

Federal income tax refund is not "earnings" for the purposes of the Consumer Credit Protection Act and refund was not protected by statute which permits garnishment of only 25% of "wages." Bankr.Act, § 14,

sub.c(6), 11 U.S.C.A. § 32(c) (6).

See publication Words and Phrases for other judicial constructions and definitions.

12. Exemptions 148(1)

The intent of the Consumer Credit Protection Act was to make sure that wage earners were able to receive at least 75% of their take home pay in any one pay period so that they would have enough cash to meet basic needs. Truth in Lending Act, §§ 301, et seq., 302, 303(a), 15 U.S.C.A. §§ 1671 et seq., 1672, 1673(a).

13. Exemptions 148(2)

"Earnings" within the Consumer Credit Protection Act provisions relating to garnishment means periodic payment of compensation and does not pertain to every asset that is traceable in some way to such compensation. Truth in Lending Act, §§ 301 et seq., 302, 303(a), 15 U.S.C.A. §§ 1611 et seq., 1672, 1673(a).

14. Bankruptcy 407(1)

Denial of discharge in bankruptcy because the bankrupt had failed to obey a lawful order of the court is not mandatory. Bankr.Act, § 41, 11 U.S.C.A. § 69.

15. Bankruptcy 4

The various provisions of the Bankruptcy Act must be read with the congressional intent to give debtors a new chance in life in mind and bankruptcy courts must exercise their powers so that substance will not give way to form and technical considerations will not prevent substantial justice from being done. Bankr.Act, § 41, 11 U.S.C.A. § 69.

16. Bankruptcy 404(1)

The Bankruptcy Act must be liberally applied toward the bankrupt applying for his discharge. Bankr.Act, § 41, 11 U.S.C.A. § 69.

17. Bankruptcy 415(3)

The referee in bankruptcy must exercise his discretion whether or not to grant a discharge, even when an order of bankruptcy court has not been followed by the bankrupt. Bankr.Act, § 41, 11 U.S.C.A. § 69.

18. Bankruptcy 229

Denial of discharge is not the only weapon available to the bankruptcy referee in order to enforce his order; recalcitrant petitioner can also be held in contempt. Bank.Act, § 41, U.S.C.A. § 69.

19. Bankruptcy 407(1)

Before denying a discharge because of bankrupt's failure to obey a lawful order of the court, the referee should weigh the detriment to the proceedings and the dignity of the court against the potential harm to the debtor if the discharge is denied and he should consider such factors as the intent behind the bankrupt's acts, whether there is a justifiable excuse, whether there was injury to the creditors and whether there was some way that the bankrupt could make amends for his conduct. Bankr.Act, § 41, 11 U.S.C.A. § 69.

Stuart Baker, New Haven, Conn. (William H. Clendenen, Jr., David M. Lesser, Joanne Faulkner, and Frank Dineen, New Haven, Conn., on the brief), for appellants.

Richard Belford, New Haven, Conn., on the brief, for appellee Trustee in Bankruptcy.

Before KAUFMAN, ANDERSON and MANSFIELD, Circuit Judges.

ROBERT P. ANDERSON, Circuit Judge:

The three appellants herein each filed separate in-

dividual voluntary petitions in bankruptcy, all of which raise the issue of whether or not, and to what extent, an income tax refund passes to the trustee in bankruptcy as property of the estate. In each case the petitioner had claimed the maximum number of deductions to which he was entitled on his tax withholding statement and in each case the refund was the only asset of the bankrupt estate.

Henry Kokoszka filed his petition and was adjudicated a bankrupt on January 5, 1972. On February 3, the referee ordered him to turn over the proceeds of his 1971 income tax refund to the trustee. After a motion to vacate the order was denied, Koloszka petitioned for review in the District Court. In the meantime, he turned over the refund amount of $250.90 to the trustee to hold pending the determination of this matter, and he was given his discharge in bankruptcy on August 24, 1972.

Herbert Sands was adjudicated a bankrupt on February 4, 1970, and was ordered to turn over his 1969 tax refund to the trustee. Instead, Sands spent his refund of $201.97, and the trustee moved on March 12, 1971, to deny the discharge for this reason. Subsequent to that, the peitioner moved to vacate the turn-over order, but the referee denied the motion and denied the discharge. Sands then petitioned the District Court for review.

Frank O'Brien was adjudicated a bankrupt on April 30, 1970, and was ordered to turn over his 1969 refund of $136.00 to the trustee. He, too, failed to obey the order and the trustee moved to deny the discharge on March 18, 1971. The referee has not yet ruled on the trustee's motion, but he did deny O'Brien's motion to vacate the original turn-over order, and the petitioner sought review of that denial.

After consolidating the three cases, the District Court held that the tax refunds were property that pass-

ed to the trustee under § 110(a) (5), and that the Consumer Credit Protection Act, 15 U.S.C. § 1671, et seq., did not require that the trustee return 75% of the refund to the petitioners. On these issues we affirm; however, we do remand Sands' case in order that the referee may exercise his discretion on whether or not to grant him a discharge in bankruptcy.

The primary point raised by this appeal is whether or not a tax refund is "property" which passes to the bankruptcy trustee under § 70(a) (5) of the Act. The Ninth Circuit recently held that such a tax refund is not § 70(a) (5) property, In Re Cedor, 470 F.2d 996 (9 Cir. 1972); aff'g on the opinion below, 337 F.Supp. 1103 (N.D.Cal.1972). In Re Jones, 337 F.Supp. 620 (D.Minn.) leave to appeal denied (8 Cir., May 14, 1971), cert. denied, 404 U.S. 1040, 92 S. Ct. 719, 30 L.Ed.2d 732 (1972), however, held that a refund does pass to the trustee and the same holding was implicit in In Re Wetterhoff, 453 F.2d 544 (8 Cir.), cert. denied, 409 U.S. 934 S.Ct. 242, 34 L.Ed. 188 (1972), holding that, at the time of filing, the excess of accrued but unpaid wages over and above the portion exempt from attachment under state law, passed to the trustee.

The decision in the present case is governed in large part by two Supreme Court cases, Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966), which held that a business generated loss-carryback tax refund, which did not accrue until after the filing of the bankruptcy petition, was § 70(a) (5) property, and Lines v. Frederick, 400 U.S. 18, 91 S.Ct. 113, 27 L.Ed.2d 124 (1970), which held that vacation pay, accrued but unpayable at the time of filing, did not pass to the trustee.

[1] For the purpose of considering what treatment should be given to the tax refunds in question here, the term "property" in § 70(a) (5) must be defined in terms of the purposes of the Bankruptcy Act, rather than by

more traditional concepts. *Segal, supra,* 382 U.S. at 379, 86 S.Ct. 511; In Re Spanish Language Television, 456 F.2d 159, 162 (9 Cir. 1972). Basically, the term "property" is given a generous construction in order to give creditors everything of value, including items where the enjoyment of value is postponed, *Segal, supra,* 382 U.S. at 379, 86 S.Ct. 511; In Re Robbins Converting Corp., 441 F. 2d 1096, 1098 (2 Cir. 1971). The definition of property is limited, however, where the debtors are wage earners "whose sole source of income, before and after bankruptcy, is their weekly earnings," *Lines, supra,* 400 U.S. at p.20, 91 S.Ct. at p. 114 and who, at the filing of their petitions in bankruptcy have wages, as such, or as vacation pay, accrued but not yet paid, and where "the minimal requirements for the economic survival of the debtor are at stake," *id.,* such wage payments are not "property" to be turned over to the trustee under § 70(a) (5). The purpose of this exception is to give the debtor a "new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt," *Lines, supra,* at 1-20, 91 S.Ct. at 114; Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934).

[2] The test as to whether or not such items as accrued but unpaid wages are or are not "property" to be turned over to the trustee is whether the item is "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70(a) (5)," *Segal, supra,* 382 U.S. at 380, 86 S.Ct. at 515.

There were two petitioners in *Lines* both of whom had accrued vacation pay at the time of the filing of the petition, but neither could receive it until he either went on vacation or his employment was terminated. The one petitioner, Frederick, worked for a manufacturing com-

pany which shut down for a week twice a year thereby forcing their employees to take a vacation. The other, Harris, could choose his vacation period, if he desired to take one.

If the vacation pay was held to be property of the estate, it would appear at first glance that Harris was in somewhat better position that Frederick, because Harris was not forced to take a vacation and go without basic support. Nevertheless, he also was in a difficult position. If he took a vacation, he would have no income for that period; yet, if he did not, and he was laid off, he would not have the use of the pay upon termination for basic support while seeking new work.

Realizing that "[t]he function of their accrued vacation pay is to support the basic requirements of life for them and their families during brief vacation periods or in the event of a layoff," the Supreme Court held that this vacation pay was a specialized type of property that did not pass to the trustee because to hold otherwise would deny the debtor the new opportunity in life which the Bankruptcy Act intended to provide, *Lines, supra*, 400 U.S. at 20, 91 S.Ct. at 114.

[3] What we have then in *Lines* is a very narrow exception to the general proposition that everything of value passes to the trustee, i.e., vacation pay which will become essential for basic week to week support in the future does not pass. Because a tax refund is not the weekly or other periodic income required by a wage earner for his basic support, to deprive him of it will not hinder his ability to make a *fresh* start unhampered by the pressure of preexisting debt. Therefore, the tax refund is § 70(a) (5) property which passes to the trustee.

[4,5] The petitioners have advanced several arguments, however, that bear some comment. First, they maintain that wages, as such, are a specialized type

of property which does not pass to the trustee and that a tax refund is nothing more than a refund of over withheld wages. The problem with this argument is that when the Court in *Lines, supra,* at 20, 91 S.Ct. 113, or in other cases such as Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), speaks of wages as a special type of property, it is referring to the periodic payments required to meet basic needs. Just because some property interest had its source in wages, however, does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which had their origin in wages.

[6] The petitioners also argue that as wage earners they have come to rely upon the tax refund as an expected annual event and that to take it from them would deny them a fresh start in life. It was this reasoning that convinced the court in In Re Cedor, *supra,* 470 F.2d at 1105, that tax refunds should not be § 70(a) (5) property, but we find it unpersuasive. Many people may come to rely upon such things as a Christmas Club account or year end dividends from stock ownership to give them a special source of income at certain times of the year, but this does not make such items immune from a turn-over order in bankruptcy. Permitting a bankrupt to retain his tax refund would not be giving him a "fresh start" to accumulate new wealth but a "head start" over others who had no such refund.

Finally, the petitioners argue that a tax refund should not be § 70(a) (5) property because such refunds will often be of no benefit to the creditors but will be used up in administration expenses.

We are concerned with the fact that, on the average, in all personal bankruptcy cases 41% of the assets of the estates are paid out for trustees' fees and

other administration expenses, D. Stanley & M. Girth, Bankruptcy: Problem, Process, Reform 91 (Brookings Institution 1971). Furthermore, nearly one case in five is one of only nominal assets, that is, a case where all of the assets in the estate are consumed in administration expenses, leaving nothing for creditors, Stanley & Girth, *supra*, at 87-88, 175.

It is apparent why this happens in the small asset estates. Section 48(c) (1) of the Act, 11 U.S.C. § 76(c) (1), provides that a trustee can be compensated up to $150.00 plus expenses no matter how small the estate, and we have recently noted that in practice trustees are generally awarded the maximum fee, In Re Schautz, 390 F.2d 797, 800 (2 Cir. 1968); *see also*, Snedecor, Fees and Allowances in Straight Bankruptcy, 40 Ref.J. 26, 27 (1966). If that standard is applied to the cases currently before us, it can be seen that there will be nothing for creditors in the O'Brien estate and, at best, only a very small balance in the Kokoszka and Sands estates which might well be used up for other administration expenses, *cf.*, Stanley & Girth, *supra*, at 92, 173-195.

[7] Clearly the purpose of the Bankruptcy Act was to benefit creditors and debtors, not trustees, *see*, In Re Kingswood, 343 F.Supp. 498, 504-505 (C.D.Cal. 1972), rev'd on other grounds, 470 F.2d 996 (9 Cir. 1972); In Re McGrath Mfg. Co., 95 F.Supp. 825, 829 (D.Neb.1951). Therefore, there is no sense in taking a small sum from the bankrupt debtor, which he could well use to get started again, if there is to be no value to the creditors.

[8-10] This does not mean, however, that all tax refunds should be held not to be § 70(a) (5) property, because a refund may be fairly large or only one asset among others. If a debtor is in a position where his non-exempt assets will be entirely eaten up by administration costs, leaving nothing for creditors, he can move the

bankruptcy court for an order of abandonment, *see* In Re Mirsky, 124 F.2d 1017 (2 Cir. 1942), cert. denied, 317 U.S. 638, 63 S.Ct. 29, 87 L.Ed. 514 (1942); *cf.*, In re Ira Haupt & Co., 398 F.2d 607, 612-613 (2 Cir. 1968). See Calverley, Income Tax Refunds Due Wage Earners, 39 Ref.J. 8, 10-11 (1965), for a general discussion of the various abandonment practices of California referees for tax refunds. In moving for an abandonment, the debtor can present what evidence and arguments he may have to support his contention that it would not work an injustice to creditors to abandon the assets and not appoint a trustee. Whether or not to grant such a motion rests in the sound discretion of the referee. He should grant the motion if it is reasonably clear that the assets, otherwise available for creditors, will be entirely consumed by trustee's fees and other administration expenses, that, no creditor has shown that there was a likely opportunity for a trustee to recover additional assets, and that the absence of a trustee will not, under the circumstances, cast a substantial additional burden on the Bankruptcy Court.

The petitioners further argue, however, that even if a tax refund is § 70(a) (5) property, the trustee can take only 25% of it because the Consumer Credit Protection Act's limitation on garnishment, 15 U.S.C. § 1671 et seq. That Act provides that no more than 25% of a person's aggregate disposable earnings for any workweek or other pay period may be subject to garnishment, 15 U.S.C. § 1673(a). The definition of the key terms "earnings", "disposable earnings," and "garnishment" are set forth in the margin.[4]

4. 15 U.S.C. § 1672 reads as follows:
"For the purposes of this subchapter: (a) The term 'earnings' means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.
(b) The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

The petitioners argue that a tax refund is "earnings" because it had its source in wages and that when it is returned to the taxpayer it is all "disposable earnings" because nothing is required by law to be withheld from the refund. Furthermore, they claim that the taking by the trustee is a "garnishment" because a bankruptcy proceeding is a legal or equitable procedure through which the earnings of an individual are withheld for payment of a debt.

[11] Although this reasoning was adopted by the Ninth Circuit in In Re Cedor, *supra,* we do not follow it, but hold that a tax refund is not "earnings" for the purpose of § 1672 and, therefore, it is not protected by § 1673.

[12,13] The intent of the Consumer Act was to make sure that wage earners were able to receive at least 75% of their take home pay in any one pay period so that they would have enough cash to meet basic needs. As a side effect, it was hoped that honest debtors, with this protection on their wages, would not be forced into bankruptcy, H.Rep. No. 1040, 90th Cong., 2d Sess., U.S.Code Cong. & Ad.News, 1962, pp. 1977-79 (1968). It is clear, then, both from the language of the statute, §§ 1672, 1673 and the legislative intent, that "earnings" means periodic payments of compensation and does not pertain to every asset that is traceable in some way to such compensation. *See also,* 29 C.F.R. § 870.10(b); In Re Kingswood, *supra; cf. Lines, supra,* 400 U.S. at 20, 91 S.Ct. 113.

Petitioner Sands also appeals from the failure of the referee to exercise his discretion on whether or not to grant him a discharge in bankruptcy, even though he

(c) The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

failed to obey the order to turn over his tax refund. The referee refused to consider a discharge, holding that § 14(c) (6) of the Bankruptcy Act, 11 U.S.C. § 32(c) (6), mandated that he deny the discharge, if the bankrupt disobeyed a lawful order. The district court did not rule on the issue in this case, but in a similar case it remanded to the referee for him to exercise his discretion, In Re Boudreau, 350 F.Supp. 644 (D. Conn. 1972).

[14] Section 14(c) of the Act requires that a discharge be granted unless a bankrupt has done one of eight things among which is failure "to obey any lawful order of ... the court," § 14(c) (6). The statute, however, does not state that a discharge *must* be denied for failing to obey and order, as the referee appears to have assumed.

[15,16] As stated above, one of the primary purposes of the Bankruptcy Act is to give debtors a new chance in life and the various provisions of the Act must be read with this intent in mind, Local Loan Co., *supra*, 292 U.S. at 244-245, 54 S.Ct. 695; therefore Bankruptcy Courts must exercise their powers so that "substance will not give way to form" and "technical consideratins will not prevent substantial justice from being done," Pepper v. Litton, 308 U.S. 295, 305, 60 S.Ct. 238, 244, 84 L.Ed. 281 (1939). To this end, we have long held that the Act must be liberally applied toward the bankrupt applying for his discharge, In Re Reisler, 278 F.618 (2 Cir. 1922); *see also*, In Re Tabibian, 289 F.2d 793, 795 (2 Cir. 1961).

[17,18] Therefore the referee must exercise his discretion whether or not to grant a discharge, even when an order has not been followed. This position as strong support in the case law, *see, e.g.* In Re Barbato, 421 F.2d 1324, 1327 (3 Cir. 1970); Jayne Meadows Travel Agency v. Dashiell, 416 F.2d 1253, 1254 (9 Cir. 1969); In Re Bourdreau, *supra;* In Re Van Meter, 208

F.Supp. 835 (S.D. Cal.1962). The denial of a discharge can work a serious depreviation upon a debtor, and there are many circumstances where a bankrupt's disobedience may have been inadvertent or otherwise excusable. Moreover the denial of a discharge is not the only weapon available to the referee in order to enforce his orders as a recalcitrant petitioner can also be held in contempt, 11 U.S.C. § 69; *cf.*, In Re U.S. Hoffman Can Corp., 373 F.2d 622, 626 (3 Cir. 1967). This is not to be read, however, as minimizing the seriousness of the debtor's offense in disobeying a lawful order nor do we suggest that a blatant violation should be condoned.

[19] Therefore, before denying a discharge, the referee should weigh the detriment to the proceedings and the dignity of the court against the potential harm to the debtor if the discharge is denied. He should consider such factors as the intent behind the bankrupt's acts – were they wilful or was there a justifiable excuse; was there injury to the creditors; and is there some way that the bankrupt could make amends for his conduct. For example, in the present case, the referee might consider granting a discharge if the petitioner turns over to the trustee the amount of his refund check.

The decision of the District holding that the entire amount of the tax refunds is property belonging to the trustee in bankruptcy is affirmed; the case of petitioner Sands is remanded to the District Court for further proceedings consistent with this opinion.

AFFIDAVIT OF SERVICE

I, Shirley Jo Williams, appellant herein, acting pro se, hereby certifies that on September 27, 1982, pursuant to Rule 28(3), Rules of the Supreme Court, I served a copy of the foregoing *Jurisdictional Statement* on each of the parties herein as follows:

On Cheetwood and Davies, Attorneys at Law, appellees herein, by depositing such copies in the United States Post Office, Bowling Green, Ohio, with first class postage prepaid, certified mail, return receipt requested, properly addressed to the post office address of R. Nigel Davies, the above named appellees' counsel of record at 317 North Main Street, Bowling Green, Ohio 43402.

All parties required to be served have been served.
Dated October 1, 1982.

Shirley Jo Williams
Shirley Jo Williams

Subscribed and sworn to before me on September 29, 1982.

Cindy J. Richards
Notary Public 5-14-87